

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

File No. 1:12-CR-98

PABLO RAZO FIERRO,

Defendant.

Change of Plea Hearing

Before

THE HONORABLE PHILLIP J. GREEN
United States Magistrate Judge
August 31, 2015

APPEARANCES

NILS R. KESSLER
Assistant U.S. Attorney
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Attorney for Plaintiff

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Attorney for Defendant

Also Present: Ellen Donohue, Interpreter

Digital audio recording transcribed by:

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

Grand Rapids, Michigan

August 31, 2015

10:10 a.m.

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P R O C E E D I N G S

THE COURT: Good morning. Please be seated.

We are here in the matter of United States v. Pablo Razo Fierro. This is case number 12-CR-98. Could I have appearance of counsel, please?

MR. KESSLER: Good morning, Your Honor. Nils Kessler for the United States.

THE COURT: Good morning.

MS. COBB: And good morning, Your Honor. Britt Cobb with Mr. Fierro.

THE COURT: Good morning. Good morning, Mr. Fierro.

DEFENDANT FIERRO: Good morning.

THE COURT: Mr. Fierro, Ms. Donohue is here. She's a court-certified interpreter. I understand that you don't need her most of the time, but you just want her here kind of on standby. Is that correct?

DEFENDANT FIERRO: Yes, that's correct.

THE COURT: Do you understand what I'm saying so far?

1 DEFENDANT FIERRO: Yes, sir.

2 THE COURT: If at any point, Mr. Fierro, you're not
3 sure you understand what I or anyone else has said, would you
4 please kind of just raise your hand and we'll all stop and
5 give Ms. Donohue a chance to translate for you, or if we need
6 to repeat it, we'll do that as well. Do you understand that?

7 DEFENDANT FIERRO: Yes.

8 THE COURT: All right. Now, Ms. Cobb, I've been
9 advised that your client has expressed an intent to plead
10 guilty to Count 1 pursuant to a plea agreement. Is that
11 right?

12 MS. COBB: That's correct, Your Honor.

13 THE COURT: All right. Mr. Fierro, before we get
14 into a whole series of things that we need to do if you are
15 going to plead guilty to this charge this morning, I need to
16 make sure that you are of a frame of mind to understand what's
17 going on. Do you understand that?

18 DEFENDANT FIERRO: Yes, sir.

19 THE COURT: And also you may be making what might be
20 the most important decision of your life. Do you understand
21 that?

22 DEFENDANT FIERRO: Yes.

23 THE COURT: Is there anything physically or mentally
24 wrong with you, sir, that would affect your ability either to
25 hear or to think clearly?

1 DEFENDANT FIERRO: No, sir.

2 THE COURT: Are you taking any prescription
3 medication?

4 DEFENDANT FIERRO: Yes, sir.

5 THE COURT: What are you taking?

6 DEFENDANT FIERRO: I take some for my high blood
7 pressure.

8 THE COURT: For your what?

9 DEFENDANT FIERRO: High blood pressure.

10 THE COURT: High blood pressure, okay. Anything
11 else?

12 DEFENDANT FIERRO: No.

13 THE COURT: Anything about that medication that
14 affects your ability to think clearly or to hear?

15 DEFENDANT FIERRO: No, sir.

16 THE COURT: All right. Have you had any other drugs
17 or alcohol in the last 24 hours?

18 DEFENDANT FIERRO: No, sir.

19 THE COURT: How far did you get in school, Mr.
20 Fierro?

21 DEFENDANT FIERRO: Okay, I didn't have much
22 education. I went only four years of school when I was in
23 Mexico.

24 THE COURT: Okay. Now, you read and write in
25 Spanish?

1 DEFENDANT FIERRO: In Spanish, yes.

2 THE COURT: Do you also read English?

3 DEFENDANT FIERRO: I do read English. I don't know
4 how to write, but I can read.

5 THE COURT: All right. Has anyone translated the
6 indictment for you into Spanish?

7 DEFENDANT FIERRO: Yes.

8 THE COURT: All right. You've had a chance to
9 review that with an interpreter as well as Ms. Cobb?

10 DEFENDANT FIERRO: Yes, sir.

11 THE COURT: All right. Very well.

12 MS. COBB: And, Your Honor, just so you know, when I
13 went over the plea agreement with Mr. Fierro at the Newaygo
14 County Jail, we did have an interpreter there as well. He did
15 not -- he did not interpret or translate the plea agreement
16 line for line simply because Mr. Fierro didn't ask him to, but
17 he was there. He was available to answer any questions, and
18 so we were able to go over that in Spanish to the extent it
19 was necessary.

20 THE COURT: All right. Ms. Cobb, are you satisfied
21 that he was able to understand the terms of the plea
22 agreement?

23 MS. COBB: Absolutely, yes.

24 THE COURT: All right. And do you have any reason
25 to question his competency to proceed this morning?

1 MS. COBB: None at all, thank you.

2 THE COURT: All right. Thank you.

3 Mr. Fierro, you have a right to have this hearing
4 conducted by the district court judge assigned to your case.
5 Your case is assigned to District Judge Robert Holmes Bell.
6 He was appointed by the President of the United States and he
7 serves a term of life.

8 I am a magistrate judge. I'm appointed by the
9 district judges to serve a term of years. It's permissible
10 for me to handle this hearing, but only if you consent. Do
11 you understand that?

12 DEFENDANT FIERRO: Yes, sir.

13 THE COURT: Do you agree to have me handle this
14 hearing?

15 DEFENDANT FIERRO: Yes, sir.

16 THE COURT: Ms. Cobb, has he signed the consent?

17 MS. COBB: He has, Your Honor.

18 THE COURT: All right. Mr. Kessler, does the
19 government also consent?

20 MR. KESSLER: We do, Your Honor.

21 THE COURT: All right. Thank you.

22 Now, let me go over your rights again with you, Mr.
23 Fierro. Have you ever heard the expression, "Don't make a
24 federal case out of it?"

25 DEFENDANT FIERRO: No, I don't.

1 THE COURT: Well, that's an expression people
2 sometimes use when they think somebody is making a bigger deal
3 out of something than they need to. I don't know that that's
4 entirely accurate, but there's something to be said for that.
5 In federal court we generally take a little bit longer to do
6 things than they do in state court, and we want to make sure
7 only that you understand what you are doing and that you're
8 making a decision with your eyes wide open. Do you
9 understand?

10 DEFENDANT FIERRO: Yes, sir.

11 THE COURT: Please do not take anything that I say
12 here this morning as an indication that I'm suggesting that
13 you decide one way or the other. Do you understand that?

14 DEFENDANT FIERRO: Yes.

15 THE COURT: I have no dog in this hunt. I'm only
16 interested in making sure you understand your rights, the
17 nature of the charges, the potential penalties so that when it
18 comes time for you to make a final decision as to whether to
19 plead guilty, you're doing it with your eyes open. Do you
20 understand that?

21 DEFENDANT FIERRO: Yes.

22 THE COURT: All right. First of all, you have the
23 right to the assistance of legal counsel throughout the
24 proceedings in your case. If you cannot afford counsel,
25 counsel will be appointed for you at no cost to you. Do you

1 understand that?

2 DEFENDANT FIERRO: Yes.

3 THE COURT: Ms. Cobb, are you retained?

4 MS. COBB: Yes, I am, Your Honor.

5 THE COURT: All right. Thank you.

6 Ms. Cobb has been hired to represent you, and that's
7 absolutely fine. That's your right under the Sixth
8 Amendment. But, Mr. Fierro, you also have the right to have a
9 court-appointed counsel at no cost to you. So if at any point
10 you were unable to pay for the services of Ms. Cobb, the Court
11 would appoint an attorney at no cost. Do you understand
12 that?

13 DEFENDANT FIERRO: Yes, sir.

14 THE COURT: So any concern that you may have about
15 paying your lawyer's bills should not come into play in
16 deciding whether to plead guilty. Do you understand that?

17 DEFENDANT FIERRO: Yes, sir.

18 THE COURT: All right. Are you satisfied with Ms.
19 Cobb's representation to date?

20 DEFENDANT FIERRO: Yes, I do.

21 THE COURT: All right. Very good.

22 You also have the right to remain silent, Mr.
23 Fierro. You have no obligation to speak to the government.
24 You have no obligation to speak to anyone in law enforcement.
25 You have no obligation to speak to anyone, for that matter.

1 Do you understand that?

2 DEFENDANT FIERRO: Yes.

3 THE COURT: If you do make a statement, what you say
4 may be used against you in a later court proceeding. Do you
5 understand that?

6 DEFENDANT FIERRO: Yes, sir.

7 THE COURT: If you continue to plead guilty this
8 morning, you're going to be giving up your right to remain
9 silent. You'll keep your right to counsel, but you will be
10 giving up your right to remain silent. Not only will you be
11 giving up that right, but you'll be placed under oath subject
12 to the penalties of perjury and I will be asking you questions
13 that will require you to incriminate yourself in that I'll be
14 asking you what you did that you believe makes you guilty of
15 the crime charged in Count 1. Do you understand that?

16 DEFENDANT FIERRO: Yes, sir.

17 THE COURT: Is it still your intention to plead
18 guilty?

19 DEFENDANT FIERRO: Yes.

20 THE COURT: All right. If we could please place Mr.
21 Fierro under oath.

22 (Defendant Fierro was sworn by the Clerk.)

23 THE COURT: All right. Please be seated. Mr.
24 Fierro, you can remain seated throughout the rest of the
25 proceedings this morning, okay?

1 DEFENDANT FIERRO: Thank you.

2 THE COURT: All right. Now, I've already asked you
3 if you had a chance to review the indictment with Ms. Cobb.
4 I'm going to go ahead and read the first count. It's not very
5 long, and I'd ask you to follow along with me if you would.

6 DEFENDANT FIERRO: Okay.

7 THE COURT: Count 1 reads as follows: Beginning on
8 or about September 28, 2004, and continuing without
9 interruption until on or about January 21st, 2011, in Muskegon
10 County, in the Western District of Michigan, Southern
11 Division, Pablo Razo Fierro, in a matter within the
12 jurisdiction of the Social Security Administration, having
13 knowledge of the occurrence of an event affecting his
14 continued right to Social Security Disability Benefits
15 payments, concealed and failed to disclose such event with the
16 intent fraudulently to secure payment when no payment was
17 authorized.

18 Specifically, defendant opened Pablo's Tacos, a
19 restaurant in Muskegon, Michigan, and returned to work as the
20 owner and operator. The defendant thereafter concealed his
21 employment from the Social Security Administration in order to
22 continue to receive and spend DIB payments to which he knew he
23 was not entitled. This is a violation of Title 42, United
24 States Code, Section 408.

25 Do you think you understand what the grand jury is

1 accusing you of in Count 1, Mr. Fierro?

2 DEFENDANT FIERRO: Yes, sir.

3 THE COURT: All right. In order to be guilty of
4 this particular offense, there are essentially three things
5 that the government would have to prove beyond a reasonable
6 doubt. First, the government would have to prove that you had
7 knowledge of some event that took place that affected your
8 ability to continue to receive Social Security benefits.
9 Secondly, that you knowingly concealed or withheld that
10 information from the Social Security Administration. And
11 finally, that you did so with the intent to defraud the Social
12 Security Administration; in other words, with the intent to
13 obtain or continue to receive benefits to which you were not
14 legally entitled. Do you think you understand the elements of
15 this offense, what the government would have to prove?

16 DEFENDANT FIERRO: Yes, sir.

17 THE COURT: All right. If you are convicted of
18 Count 1, which you will be if you plead guilty, Mr. Fierro,
19 you face a maximum penalty of five years in prison, a fine of
20 up to \$250,000, or I think the fine is the greater of either
21 \$250,000 or twice the amount of gross gain or loss. Mr.
22 Kessler, is there any chance of that latter provision kicking
23 in?

24 MR. KESSLER: Yes, Your Honor. The gross gain or
25 loss is -- it's in the 200-and-something-thousand-dollar

1 range. We're still disputing that a little, but that would
2 put it at about 400 to \$500,000.

3 THE COURT: All right. Thank you.

4 Mr. Fierro, this is a little bit complicated, okay,
5 because the statute has two separate provisions on the maximum
6 fine. Part of it says the maximum fine's \$250,000, but
7 there's an exception, and if the amount of -- the gross amount
8 of loss to the government or gain to you is greater, is more
9 than \$250,000, then the fine's going to be double that, the
10 maximum fine. Do you understand that?

11 DEFENDANT FIERRO: Yes.

12 THE COURT: All right. You also would be required
13 to pay what's known as a mandatory special assessment of \$100,
14 and you face a period of supervised release of up to three
15 years.

16 Supervised release is a period of time following
17 incarceration in which an individual is subject to certain
18 terms and conditions set by the sentencing judge. If he or
19 she violates any term or condition, he or she could be
20 returned to prison for up to the full term of supervised
21 release. In some instances, Mr. Fierro, an individual could
22 spend more time in prison than what was allowed as the maximum
23 penalty for the offense of conviction. Do you think you
24 understand all these penalties?

25 DEFENDANT FIERRO: Yes.

1 THE COURT: Okay. In addition, you would be subject
2 to restitution in which the Court would order you to repay the
3 government whatever the losses to the government were. Do you
4 understand that?

5 DEFENDANT FIERRO: Yes.

6 THE COURT: All right. Now, let me talk to you
7 about something that the Congress did in 1984. Congress
8 passed a statute called the Sentencing Reform Act. That
9 statute did a number of things, one of which was to create
10 what's known as the Sentencing Guidelines Commission. That
11 commission is charged with developing and maintaining what's
12 known as the federal sentencing guidelines. Every year they
13 come out with a new manual. I think this is still the current
14 manual. I'm holding up the 2014 edition which appears to me
15 to be lavender or purple in color. Has Ms. Cobb talked to you
16 about the sentencing guidelines?

17 DEFENDANT FIERRO: Yes.

18 THE COURT: All right. Well, that's perfectly
19 appropriate for her to do that. I'm going to very generally
20 describe to you how the guidelines work just to make sure that
21 you understand the system.

22 Under the guidelines two things are -- Judge Bell,
23 who will be your sentencing judge, would have to do two
24 things, basic things. One is determine what's known as your
25 total offense level, and secondly, to determine your criminal

1 history category.

2 The total offense level is a number, and that
3 process begins with what's known as a base offense level,
4 which is usually linked to the offense of conviction, and then
5 there may be certain aggravating or mitigating factors that
6 increase or decrease that number. An aggravating factor is
7 something that goes against you, okay, which would increase
8 the number. A mitigating factor is something in your favor
9 which would reduce the number.

10 An example of a mitigating factor is what's known as
11 credit for acceptance of responsibility. If an individual
12 pleads guilty and is otherwise qualified for it, then the
13 judge, the sentencing judge can reduce their base -- their
14 offense level by two levels, and if their adjusted offense
15 level is 16 or greater and if the government asks the Court to
16 do so, then the judge can add an additional level off for a
17 total of three levels off reduction. Do you understand that?

18 DEFENDANT FIERRO: Yes, sir.

19 THE COURT: That's an example of a mitigating
20 factor. Once the base offense level is determined and the
21 judge calculates any aggravating or mitigating factors, then
22 the judge comes to a final level, a number, which is known as
23 the total offense level.

24 Then Judge Bell is going to determine your criminal
25 history category. There are six criminal history categories.

1 It's based on a point system. And if you have any criminal
2 history, and I don't know whether you do, but if you do, then
3 the Probation Department will go through and make a
4 recommendation as to what your criminal history category is
5 based on points that are linked to the nature of the
6 conviction, the sentences, how long ago they occurred, things
7 like that. Once the judge has added up all the applicable
8 points that apply to a criminal history category, that will
9 tell him which criminal history category you are in, I through
10 VI.

11 Once Judge Bell knows that, then he will go to a
12 sentencing guidelines table, an example of which is in the
13 back cover of this sentencing guidelines manual. He'll go
14 down vertically to the point where it comes to your total
15 offense level. Then he'll go across horizontally to the
16 column that contains your criminal history category. That
17 will then tell Judge Bell what your sentencing guidelines
18 range is in months. Do you understand that?

19 DEFENDANT FIERRO: Yes, sir.

20 THE COURT: Now, I'm sure Ms. Cobb has talked to you
21 about what she thinks your sentencing guidelines may be in
22 this case. Is that right?

23 DEFENDANT FIERRO: Yes.

24 THE COURT: Again, that's perfectly appropriate for
25 her to do that. But do you understand that Judge Bell and

1 only Judge Bell can ultimately decide what your sentencing
2 guidelines are?

3 DEFENDANT FIERRO: Yes.

4 THE COURT: Do you understand that if Judge Bell
5 disagrees or reaches a decision that's different than what you
6 or Ms. Cobb thinks it should be, that's not a basis for you to
7 withdraw from your plea?

8 DEFENDANT FIERRO: Yes.

9 THE COURT: If Judge Bell sentences you above the
10 sentencing guidelines all the way up to the five-year
11 statutory maximum, that also is not a basis to withdraw from
12 your plea. Do you understand that?

13 DEFENDANT FIERRO: Yes, sir.

14 THE COURT: Do you understand that while Judge Bell
15 is required to accurately calculate your sentencing
16 guidelines, he's not obligated to sentence you within those
17 guidelines?

18 DEFENDANT FIERRO: Yes.

19 THE COURT: Now, if you plead guilty, a presentence
20 report will be prepared by the Probation Department. The
21 first one that will come out is known as an initial
22 presentence report. That report will contain a great deal of
23 information about your background, about the alleged offense
24 conduct, about any criminal history that you may have, and it
25 will contain the Probation Department's recommendations as to

1 which sentencing guidelines provisions apply and what your
2 criminal history category should be.

3 You and Ms. Cobb will have an opportunity to review
4 that report to make suggested changes, additions or
5 corrections to that report. You'll also have the opportunity
6 to object if you don't agree with one of the sentencing
7 guidelines or criminal history category recommendations as
8 made by the Probation Department. Do you understand that?

9 DEFENDANT FIERRO: Yes, sir.

10 THE COURT: Ms. Cobb and Mr. Kessler will then have
11 an opportunity to sit down with the Probation Department
12 person who wrote the report and discuss their respective views
13 on the report. If Ms. Cobb is successful in convincing the
14 Probation Department to make the changes that you and she
15 thinks should be made, then that's good. Then you'll proceed
16 to sentencing on that basis. The government can still make
17 objections if it wants to just like you can.

18 It's important for you to understand, Mr. Fierro,
19 that if the Probation Department does not make recommendations
20 that you believe should be made or you disagree with the
21 recommendations that are being made, that you can persist in
22 your objections to those, but you need to bring those
23 objections to the attention of Judge Bell at sentencing. Do
24 you understand that?

25 DEFENDANT FIERRO: Yes.

1 THE COURT: All right. Now, another thing that
2 Congress did in the Sentencing Reform Act is to abolish
3 parole. In the state system, if an individual is convicted of
4 a crime, then he or she is generally sentenced to what's known
5 as an indeterminate or range sentence; for example, five to
6 ten years. After that individual serves the minimum term of
7 sentence, five years, for example, then they're generally
8 eligible for what's known as parole, which is release from
9 prison prior to the completion of the entire sentence. We
10 don't have parole in the federal system anymore. Do you
11 understand that?

12 DEFENDANT FIERRO: Yes.

13 THE COURT: So if you plead guilty and you are
14 sentenced to prison by Judge Bell, you should expect to serve
15 the full term imposed by Judge Bell minus any credit for good
16 time served that would be computed by the Bureau of Prisons.
17 Do you understand that?

18 DEFENDANT FIERRO: Yes.

19 THE COURT: Now, I've talked to you about a number
20 of the penalties that are associated with Count 1 if you are
21 convicted. There are other adverse consequences that may come
22 to you if you plead guilty to this charge, Mr. Fierro. You
23 may be deprived of certain civil rights, for example the right
24 to vote, the right to hold office, the right to serve on a
25 jury, the right to possess firearms. Do you understand that?

1 DEFENDANT FIERRO: Yes, sir.

2 THE COURT: Is he a U.S. citizen? What is his --

3 DEFENDANT FIERRO: Yes.

4 MS. COBB: He is, Your Honor.

5 THE COURT: He is, all right. Is he on probation or
6 parole?

7 MS. COBB: No.

8 THE COURT: All right. Mr. Fierro, you pled not
9 guilty to the charges in the indictment and you have the right
10 to continue to persist in a not guilty plea and to go to
11 trial, and I want to talk to you about what rights you have if
12 you choose to go to trial. That would be a trial by jury, a
13 jury of your peers. You have the right to the assistance of
14 legal counsel. Ms. Cobb will represent you throughout that
15 trial if you choose to go to trial.

16 You have the right to have at least 30 days to
17 prepare for that trial. You have the right through Ms. Cobb
18 to confront and cross-examine any witness the government calls
19 against you. You have the right to present evidence and call
20 witnesses if you choose, but you're not required to. If you
21 want a witness to testify and that person is unwilling to come
22 voluntarily, the Court will order them to appear.

23 You have the right not to be compelled to
24 incriminate yourself at trial. What that means is if you
25 choose to go to trial and you do not wish to testify, no one

1 can compel you to testify, and if you choose not to testify,
2 Judge Bell will tell the jury that they cannot hold the fact
3 that you did not testify against you. But you also have the
4 right to testify. If you choose to go to trial and you want
5 to testify, no one could prevent you from testifying. Do you
6 understand that?

7 DEFENDANT FIERRO: Yes, sir.

8 THE COURT: All right. You are presumed innocent
9 and you remain under that presumption unless and until the
10 government proves you guilty beyond a reasonable doubt, and if
11 you go to trial, Judge Bell will tell the jury that. Do you
12 understand that?

13 DEFENDANT FIERRO: Yes.

14 THE COURT: Now, if you plead guilty, Mr. Fierro,
15 you'll be giving up all your rights that are associated with
16 going to trial that I've discussed with you with the exception
17 of the right to legal counsel, you'll keep that, because there
18 won't be any trial. All that will be left is for Judge Bell
19 to sentence you. Do you understand that?

20 DEFENDANT FIERRO: Yes, sir.

21 THE COURT: Do you think you understand all of your
22 rights, the nature of the charge in Count 1, and the potential
23 penalties if you're convicted of that charge?

24 DEFENDANT FIERRO: Yes, I do.

25 THE COURT: Has anyone threatened you to get you to

1 plead guilty, Mr. Fierro?

2 DEFENDANT FIERRO: No, sir.

3 THE COURT: Anybody putting pressure or coercion on
4 you?

5 DEFENDANT FIERRO: No, sir.

6 THE COURT: Has anybody made any promise to you
7 other than in the plea agreement?

8 DEFENDANT FIERRO: No, sir.

9 THE COURT: Are you pleading guilty because it's
10 your decision to plead guilty?

11 DEFENDANT FIERRO: Yes, sir.

12 THE COURT: Have you had an adequate opportunity to
13 think about it and to discuss it with Ms. Cobb?

14 DEFENDANT FIERRO: Yes.

15 THE COURT: All right. Let's take a look at the
16 plea agreement. First let's go to the last page, Page 8.
17 There appears to be two signatures on this page. Is that
18 right, Mr. Fierro?

19 DEFENDANT FIERRO: Yes, sir.

20 THE COURT: And one is Ms. Cobb, and is the other
21 one yours?

22 DEFENDANT FIERRO: Yes.

23 THE COURT: Did you sign this plea agreement on
24 August 18th of this year?

25 DEFENDANT FIERRO: Yes, sir.

1 THE COURT: All right. Now, Ms. Cobb told me that
2 you understood this plea agreement. Do you agree with her?

3 DEFENDANT FIERRO: Yes.

4 THE COURT: Did you read it carefully before you
5 signed it?

6 DEFENDANT FIERRO: Yes, I do.

7 THE COURT: Did you discuss it with Ms. Cobb?

8 DEFENDANT FIERRO: Yes.

9 THE COURT: Do you believe that before you signed
10 the plea agreement you understood all the terms and provisions
11 in this plea agreement?

12 DEFENDANT FIERRO: Yes, sir.

13 THE COURT: I'm going to read to you the paragraph
14 immediately above your signature and I'd like you to follow
15 along silently, please.

16 DEFENDANT FIERRO: Okay.

17 THE COURT: "I have read this agreement and
18 carefully discussed every part of it with my attorney. I
19 understand the terms of this agreement and I voluntarily agree
20 to those terms. My attorney has advised me of my rights, of
21 possible defenses, of the sentencing provisions, and of the
22 consequences of entering into this agreement. No promises or
23 inducements have been made to me other than those contained in
24 this agreement. No one has threatened or forced me in any way
25 to enter into this agreement. Finally, I am satisfied with

1 the representation of my attorney in this matter."

2 Did I read that correctly, Mr. Fierro?

3 DEFENDANT FIERRO: Yes, sir.

4 THE COURT: Was all of that true when you signed the
5 plea agreement?

6 DEFENDANT FIERRO: Yes.

7 THE COURT: Is all of that still true?

8 DEFENDANT FIERRO: Yes, sir.

9 THE COURT: All right. I'm going to ask you about
10 some of the provisions in the plea agreement, but not all of
11 them.

12 All right. Let's turn to Paragraph 4 on Page 2,
13 please. Now, this says that you agree to make full
14 restitution for any losses to the government resulting from
15 your alleged Social Security fraud. Do you understand that?

16 DEFENDANT FIERRO: Yes, sir.

17 THE COURT: And that's not limited to the count of
18 conviction. In other words, if the government can prove to
19 Judge Bell that the government suffered losses associated with
20 your Social Security fraud that go beyond Count 1, they may
21 ask the judge to order you to repay that as well. Do you
22 understand that?

23 DEFENDANT FIERRO: Yes.

24 THE COURT: And you're agreeing to do that. Do you
25 understand that?

1 DEFENDANT FIERRO: Yes, sir.

2 THE COURT: All right. Now, Paragraph 5 has the
3 factual basis of guilt. We're going to skip over that for
4 right now.

5 I want to turn to Paragraph 6 which has the United
6 States Attorney's Office's promises to you. First of all, in
7 Paragraph 6-A the government is agreeing to move to dismiss
8 Count 2 as well as the associated forfeiture allegation at the
9 time of the sentencing. Do you understand that?

10 DEFENDANT FIERRO: Yes, sir.

11 THE COURT: In Paragraph 6-B it talks about
12 acceptance of responsibility. Remember that was the example
13 of a mitigating factor I talked to you about a little while
14 ago?

15 DEFENDANT FIERRO: Yes.

16 THE COURT: And here the government is saying that
17 it's not going to oppose your request for two levels off for
18 acceptance of responsibility as long as you qualify, but the
19 government reserves the right to still object to you getting
20 that if the government believes that you've acted
21 inconsistently with that. Do you understand that?

22 DEFENDANT FIERRO: Yes, sir.

23 THE COURT: Moreover, the government has agreed that
24 if you are eligible for acceptance of responsibility and if
25 your adjusted offense level is 16 or greater, the government

1 agrees to ask Judge Bell to give you an additional level off.
2 Do you understand that?

3 DEFENDANT FIERRO: Yes, sir.

4 THE COURT: In Paragraph 6-C the government is
5 agreeing not to prosecute you for any other criminal conduct
6 relating to this case, but the government is not agreeing to
7 not prosecute you for criminal tax violations. Do you
8 understand that?

9 DEFENDANT FIERRO: Yes, sir.

10 THE COURT: No one is suggesting that you've
11 committed any, but if you have, this plea agreement doesn't
12 protect you from that. Do you understand that?

13 DEFENDANT FIERRO: Yes.

14 THE COURT: This plea agreement also does not
15 protect you from prosecution for anything you may have done
16 after you signed the plea agreement. Do you understand that?

17 DEFENDANT FIERRO: Yes, sir.

18 THE COURT: All right. Paragraph 7 talks about the
19 sentencing guidelines. We've already discussed that.

20 In Paragraph 8 both you and the government has
21 acknowledged that neither one of you have agreed to any
22 particular sentencing guidelines. Do you understand that?

23 DEFENDANT FIERRO: Yes, sir.

24 THE COURT: So both you and the government are free
25 to argue for whatever guideline range each of you believes is

1 appropriate. Do you understand?

2 DEFENDANT FIERRO: Yes.

3 THE COURT: Paragraph 9 talks about the waiver of
4 constitutional rights. We've already done that.

5 I'd like to take a look at Paragraph 10. This is a
6 significant concession that you are making, Mr. Fierro. This
7 is a waiver of what's known as appellate or collateral attack
8 rights, and I want to make sure you understand what you're
9 agreeing to here. But before we do that, let me make sure you
10 understand the difference between a direct appeal and what's
11 known as a collateral attack. This gets a little difficult
12 sometimes for people to understand, okay? Even lawyers
13 sometimes and judges have a little difficulty understanding
14 this, so let me see if I can help you.

15 A direct appeal occurs if someone is convicted of a
16 crime and sentenced, they can go directly to the Court of
17 Appeals. In this district we are covered by what's known as
18 the Sixth Circuit Court of Appeals which sits in Cincinnati,
19 Ohio. So if you were convicted and you believed that Judge
20 Bell -- there was something wrong with your conviction or your
21 sentence, on a direct appeal you could go to the Sixth Circuit
22 and ask the Sixth Circuit to correct it.

23 If the Sixth Circuit didn't do what you wanted, then
24 you could go to the Supreme Court of the United States and ask
25 the Supreme Court to take your case. Maybe they'll take it;

1 maybe they won't. If they take it and they decide it, then
2 that's generally the end of your direct appeal. If they don't
3 take it, that's the end of your direct -- what's known as a
4 direct appeal. Do you understand that?

5 DEFENDANT FIERRO: Yes.

6 THE COURT: Once the direct appeal is exhausted,
7 then an individual normally has another option available to
8 them to challenge the conviction or sentence, and that's
9 what's known as a collateral attack, sometimes referred to as
10 a habeas corpus petition. Habeas corpus is Latin. It means
11 you have the body, okay, and it's a civil lawsuit in which
12 someone brings the action claiming that they're being held in
13 custody in violation of their constitutional rights and
14 they're asking the Court to order their release.

15 It's called a collateral attack because it's kind of
16 a sideways way of coming about challenging the conviction. As
17 I said, it's a separate civil lawsuit. It's generally filed
18 before the same judge who sentenced you. In this case it
19 would be Judge Bell. But you'd be able to bring that separate
20 lawsuit alleging any constitutional violation that you thought
21 occurred in your conviction or your sentence. Do you
22 understand that?

23 DEFENDANT FIERRO: Yes, sir.

24 THE COURT: As a general proposition, in this
25 paragraph of the plea agreement you're giving up your rights

1 to both a direct and collateral attack, a direct appeal and
2 collateral attack, with certain exceptions. Do you understand
3 that?

4 DEFENDANT FIERRO: Yes, sir.

5 THE COURT: And I'm going to talk to you now about
6 what those exceptions are. The first exception is if Judge
7 Bell gave you a sentence that was greater than the five-year
8 statutory maximum. You could still appeal that.

9 The second exception is if Judge Bell were to
10 sentence you on some unconstitutional factor; for example,
11 your race, religion, national origin or gender. Okay? Do you
12 understand that?

13 DEFENDANT FIERRO: Yes.

14 THE COURT: The third exception is if you believe
15 that Judge Bell incorrectly calculated your sentencing
16 guideline range and you objected at the sentencing. Remember
17 when I talked to you about the process and how important it is
18 if you believe that the presentence report incorrectly
19 calculates your guidelines, you need to raise that issue with
20 Judge Bell so he can decide it. Remember that?

21 DEFENDANT FIERRO: Yes.

22 THE COURT: So this exception is saying that if you
23 do that, if you raise that issue with Judge Bell and he rules
24 against you, you can appeal that. Do you understand that?

25 DEFENDANT FIERRO: Yes.

1 THE COURT: All right. The next exception is if
2 Judge Bell gives you a sentence above the sentencing
3 guidelines, okay? And here what happens is Judge Bell
4 calculates what your sentencing guidelines range is, and
5 remember I told you the law allows him to sentence you to
6 anything from zero to five years. He's not bound by the
7 sentencing guidelines. Do you understand that?

8 DEFENDANT FIERRO: Yes, sir.

9 THE COURT: So this exception says if Judge Bell
10 sentences you above the sentencing guidelines, then you can
11 appeal, but all you can appeal is the reasonableness of the
12 sentence. Do you understand that?

13 DEFENDANT FIERRO: Yes, sir.

14 THE COURT: The next exception is if the guilty plea
15 which we're doing here today is involuntary or unknowing,
16 okay? It would be involuntary if somebody were coercing you
17 or putting pressure on you, if it was not your free choice.
18 Do you understand that?

19 DEFENDANT FIERRO: Yes.

20 THE COURT: Remember all those questions I asked you
21 about that?

22 DEFENDANT FIERRO: Yes, sir.

23 THE COURT: Okay. And an unknowing plea is one that
24 you did without understanding what your rights are, if you
25 didn't understand the nature of the charges, you didn't

1 understand the penalties. That's why I take so much time to
2 make sure you understand those things. Do you see what I'm
3 saying?

4 DEFENDANT FIERRO: Yes.

5 THE COURT: But if either of those things were true,
6 if your plea was involuntary or unknowing, then you could
7 still appeal that or bring a collateral attack. Do you
8 understand?

9 DEFENDANT FIERRO: Yes.

10 THE COURT: And then the last thing would be is if
11 you believed that Ms. Cobb in representing you was
12 ineffective. Do you understand that?

13 DEFENDANT FIERRO: Yes.

14 THE COURT: But other than those exceptions, you're
15 giving up your right to appeal and to bring a collateral
16 attack. Do you understand that?

17 DEFENDANT FIERRO: Yes, sir.

18 THE COURT: And if you file an appeal and it doesn't
19 fit in one of these exceptions, the government's going to ask
20 the Court of Appeals to dismiss your appeal, and you should
21 expect that that's what will happen. Do you understand that?

22 DEFENDANT FIERRO: Yes.

23 THE COURT: All right. In the next paragraph you're
24 giving up your right to bring what's known as a FOIA request.
25 FOIA stands for Freedom of Information Act, and under that

1 statute you would normally have the right to ask the
2 government to disclose to you certain information or documents
3 about your case that it has in its possession. But here you
4 are agreeing to give up your right to make any requests like
5 that. Do you understand that?

6 DEFENDANT FIERRO: Yes.

7 THE COURT: Not only are you agreeing that you won't
8 make such a request, but you're agreeing that no one will do
9 it on your behalf. Do you understand that?

10 DEFENDANT FIERRO: Yes.

11 THE COURT: All right. Paragraph 12 makes it clear
12 the Court is not a party to this agreement. That's very
13 true. You see three signatures on this plea agreement: the
14 prosecutor, yours, and Ms. Cobb. Is that right?

15 DEFENDANT FIERRO: Right.

16 THE COURT: Okay. Nowhere on here do you see Judge
17 Bell's signature, do you?

18 DEFENDANT FIERRO: No.

19 THE COURT: All right. Well, it's important for you
20 to understand that Judge Bell is not bound by any provision in
21 this plea agreement. Do you understand that?

22 DEFENDANT FIERRO: Yes, sir.

23 THE COURT: So if at sentencing he decides to
24 sentence you in a manner inconsistent with any of these terms,
25 if he decides not to do something that's a term of this plea

1 agreement, that's not a basis for you to withdraw from your
2 plea. Do you understand that?

3 DEFENDANT FIERRO: Yes.

4 THE COURT: Paragraph 13 says that the agreement's
5 limited to the parties. Mr. Kessler represents the United
6 States here in the Western District of Michigan, but he cannot
7 bind another district or another government agency. Do you
8 understand that?

9 DEFENDANT FIERRO: Yes.

10 THE COURT: Paragraph 14 talks about the
11 consequences of breach. Breach is a term used in contract
12 law, Mr. Fierro, and the term breach means to break a promise
13 that's made in a contract. This plea agreement is a
14 contract. It's a contract between you and the United States
15 Attorney's Office.

16 If you break any of the promises that you made in
17 this contract, one of two things could happen in essence.
18 One, the government could ask Judge Bell to tear up the plea
19 agreement, tear up your plea, and put you back at square one
20 where you are today. Do you understand that?

21 DEFENDANT FIERRO: Yes.

22 THE COURT: The other thing the government could do
23 is ask Judge Bell to keep your plea, but deprive you of
24 certain benefits you would have otherwise received under the
25 plea agreement. Do you understand that?

1 DEFENDANT FIERRO: Yes.

2 THE COURT: The last paragraph, Paragraph 15,
3 indicates that this is the complete agreement, meaning
4 everything that the government has agreed to, every
5 understanding that you have with the government is contained
6 in the eight pages of this plea agreement. Is that correct?

7 DEFENDANT FIERRO: That's correct.

8 THE COURT: Has anybody made any promises to you or
9 suggested anything that anyone will do for you that's not in
10 this plea agreement?

11 DEFENDANT FIERRO: No, sir.

12 THE COURT: All right. Ms. Cobb, are you aware of
13 any side agreements?

14 MS. COBB: I'm not, Your Honor.

15 THE COURT: Mr. Kessler, are there any?

16 MR. KESSLER: There are not, Your Honor.

17 THE COURT: All right. Thank you. Mr. Kessler, is
18 there anything about the plea agreement that you would like me
19 to cover that I haven't?

20 MR. KESSLER: No, Your Honor.

21 THE COURT: All right. Ms. Cobb, anything on your
22 behalf?

23 MS. COBB: No, thank you.

24 THE COURT: All right. Now we're down to zero hour,
25 Mr. Fierro. This is the time when you ultimately have to

1 decide whether to plead guilty. But before I ask you, do you
2 have any questions about anything I've discussed with you?

3 DEFENDANT FIERRO: No, sir.

4 THE COURT: All right. Mr. Fierro, how do you plead
5 to Count 1 in the indictment charging you with Social Security
6 fraud?

7 DEFENDANT FIERRO: I plead guilty.

8 THE COURT: All right. Now, Mr. Fierro, in federal
9 court we cannot accept a guilty plea unless we're satisfied
10 that the person in fact is guilty. Accordingly, we do what's
11 known as a factual basis to establish that. So I need to ask
12 you some questions now to establish a factual basis for your
13 guilty plea to Count 1.

14 But let's take a look at the plea agreement,
15 Paragraph 5, which is on -- begins on Page 2. Are you there?

16 DEFENDANT FIERRO: Yes.

17 THE COURT: All right. Now, this says that in 1996
18 you applied for and began receiving Social Security payments.
19 Is that right?

20 DEFENDANT FIERRO: That's correct.

21 THE COURT: Now, were these Disability Income
22 Benefits? In other words, do you know what DIB is or
23 Disability Income Benefits are?

24 (The question was translated by the Interpreter.)

25 DEFENDANT FIERRO: Yes.

1 THE COURT: All right. In other words, you began
2 receiving Social Security benefits because you became
3 disabled; is that right?

4 DEFENDANT FIERRO: Yes, sir.

5 THE COURT: What was your disability?

6 DEFENDANT FIERRO: I hurt my back.

7 THE COURT: Okay. Now, at the time you began
8 receiving disability benefits, did you agree to tell the
9 Social Security Administration if circumstances changed and
10 you were able to return to work?

11 DEFENDANT FIERRO: Yes, I did.

12 THE COURT: All right. Now, it says here that in
13 2004, that you opened a restaurant called Pablo's Tacos. Is
14 that right?

15 DEFENDANT FIERRO: That's correct.

16 THE COURT: And where is that located?

17 DEFENDANT FIERRO: Muskegon, Michigan.

18 THE COURT: Okay. Now, when you opened that in 2004
19 were you actively involved in running the business?

20 DEFENDANT FIERRO: Yes, sir.

21 THE COURT: Did you get an income from that
22 business?

23 DEFENDANT FIERRO: Well, I never get paid, but I was
24 using the money for everything, you know.

25 THE COURT: All right. So you got financial benefit

1 from it; is that right?

2 DEFENDANT FIERRO: Yes, that's correct.

3 THE COURT: Okay. Now, it says -- and let's look
4 specifically at Count 1. Count 1 has some dates in here. It
5 says beginning September 28, 2004. Is that about the time you
6 opened Pablo's Tacos?

7 DEFENDANT FIERRO: That's correct.

8 THE COURT: Okay. Then it goes on, it says until
9 January 21st of 2011. What happened in January of 2011?

10 DEFENDANT FIERRO: Okay. May -- can I say in
11 Spanish?

12 THE COURT: Of course.

13 DEFENDANT FIERRO: Okay. Thank you.

14 DEFENDANT FIERRO (Through Interpreter): The Social
15 Security called me and they said that I was working.

16 THE COURT: Okay.

17 DEFENDANT FIERRO: I agreed with them. I said yes,
18 I was working. Instead of going through the whole process, I
19 went to Mexico because I was scared. The attorney scared me
20 that they were going to give me 20 years of jail.

21 THE COURT: Okay. Let me stop you there, Mr.
22 Fierro. When you say go through the whole process, what do
23 you mean by that?

24 DEFENDANT FIERRO: To keep coming through Social
25 Security, to keep doing the whole investigation with them.

1 THE COURT: All right. Now, when you began
2 operating Pablo's Tacos restaurant, did you understand that
3 you weren't entitled to continue to receive Social Security
4 Disability Benefits?

5 DEFENDANT FIERRO: Yes. I knew that what I was
6 doing was wrong.

7 THE COURT: Okay. And did you continue to receive
8 those Social Security Disability Benefits after you opened the
9 restaurant?

10 DEFENDANT FIERRO: Yes.

11 THE COURT: Did you continue receiving them until
12 January of 2011?

13 DEFENDANT FIERRO: Yes.

14 THE COURT: All right. Did you understand that you
15 had an obligation to tell the Social Security Administration
16 that you had been working even before they contacted you?

17 DEFENDANT FIERRO: Yes. I understood that I had to
18 notify them and that what I was doing was wrong.

19 THE COURT: Okay. Why didn't you notify them?

20 DEFENDANT FIERRO: Because I needed to still have
21 the insurance because it was giving me a lot of medicine,
22 medicine for pain.

23 THE COURT: All right. So is it the case that you
24 didn't contact the Social Security Administration when you
25 opened the restaurant because you didn't want them to stop

1 giving you the disability payments?

2 DEFENDANT FIERRO: Yes.

3 THE COURT: Mr. Kessler, is there anything else that
4 you'd like to cover?

5 MR. KESSLER: No, Your Honor. I think you've
6 covered all the elements.

7 THE COURT: All right. Ms. Cobb, are you satisfied
8 that we have a factual basis?

9 MS. COBB: I certainly am, Your Honor, thank you.

10 THE COURT: All right. Very good.

11 I find that Mr. Fierro understands the nature of the
12 charge in Count 1 and the penalties provided by law for that
13 count. I find that his plea is made knowingly and with full
14 understanding of each of the rights I explained to him. I
15 find that his plea is voluntary, free of any force, threats or
16 promises apart from the plea agreement. I also find that his
17 plea has a sufficient factual basis.

18 I defer acceptance of the plea agreement to Judge
19 Bell who will make that decision after he's had an opportunity
20 to review the presentence report. I will recommend to Judge
21 Bell that he accept your plea, Mr. Fierro, and adjudicate you
22 guilty. Mr. Fierro, you have 14 days from the time of the
23 issuance of my recommendation which will come out today to
24 make any objections, and if you want to object, Ms. Cobb will
25 handle that for you. Do you understand that?

1 DEFENDANT FIERRO: Yes, sir.

2 THE COURT: Mr. Fierro, Judge Bell's case manager
3 will be scheduling a sentencing hearing for you probably in
4 about 90 days. The reason it goes that far out is because the
5 Court needs to allow an opportunity for the Probation
6 Department to conduct its presentence investigation, write the
7 report, give you and Ms. Cobb an opportunity for input. We
8 want to make sure that at the time of your sentencing Judge
9 Bell has all the information he needs to make a decision in
10 your case. Do you understand that?

11 DEFENDANT FIERRO: Yes, sir.

12 THE COURT: All right. Do you have any questions at
13 this time, Mr. Fierro?

14 DEFENDANT FIERRO: No, sir.

15 THE COURT: All right. Mr. Kessler, is there
16 anything else we need to take up at this time?

17 MR. KESSLER: No, Your Honor, thank you.

18 THE COURT: All right. Ms. Cobb, anything?

19 MS. COBB: No, thank you, Your Honor.

20 THE COURT: All right. Mr. Fierro, I wish you well.

21 DEFENDANT FIERRO: Thank you.

22 THE COURT: We are adjourned.

23 (Proceedings concluded at 10:49 a.m.)
24
25

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

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